



European Economic and Social Committee

TEN/141
Air service
agreements/Member States
and third countries

Brussels, 16 July 2003

OPINION

of the European Economic and Social Committee

on the

Proposal for a European Parliament and Council Regulation on the negotiation and implementation of air service agreements between Member States and third countries

COM(2003) 94 final - 2003/0044 (COD)

On 14 March 2003 the Council decided to consult the European Economic and Social Committee under Article 80(2) of the Treaty establishing the European Community on the

*Proposal for a European Parliament and Council Regulation on the negotiation and implementation of air service agreements between Member States and third countries*¹
COM(2003) 94 final – 2003/0044 (COD)).

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 26 June 2003. The rapporteur was **Mr Ghigonis**.

At its 401st plenary session of 16 and 17 July 2003 (meeting of 16 July) the European Economic and Social Committee adopted the following opinion by 119 votes with one abstention:

1. Introduction and context

1.1 Over the last fifteen years, the European Union has completed an impressive liberalisation and integration programme for the air transport sector. The Community has merged the various aviation traffic markets into a single "internal" area. By adopting measures to liberalise air transport - measures known as the "third package" - it has applied the principles underpinning the single market programme to this industry.

1.2 Nevertheless, international flights departing from and arriving in the EU remain subject to conventional bilateral agreements on air transport. In other words, the EU does not yet have a coherent international air traffic policy. In its White Paper entitled "European transport policy for 2010: time to decide"², the Commission highlighted external action in aviation as being a key priority, in view of the impact that the fragmented approach to this subject matter has had on the European air transport industry. The Commission has always believed that such agreements generated distortions in competition between European airlines and interfered with the development of the single market by limiting the possibilities for investment and consolidation between European air transport companies; such agreements stipulate that more than 50% of these companies must be owned by nationals of the country of origin of the airline concerned, otherwise the airline risks losing its international traffic rights. In December 1998, the Commission launched infringement proceedings against eight states, criticising agreements which allocated traffic rights to American airlines for flights from, to and within the EU in exchange for a similar, but strictly limited right granted to national airlines from

¹ The Commission also calls for other measures, namely that authorisation be given to start up negotiations:

- between the Community and the United States on the creation of an Open Aviation Area; and
- at Community level on the designation of Community carriers on international routes to and from third countries and on matters within Community exclusive competence.

² COM(2001) 370 of 12.9.2001.

these eight countries (the "nationality clause"). In its judgement of 5 November 2002³, the Court of Justice criticised these states on the grounds that, in concluding these "open skies" agreements with the United States, they had encroached upon the European Commission's external powers in respect of air tariffs on intra-Community routes and computer reservation systems (CRS). The Court also found that the clauses on the ownership and control of airlines flouted the principle of the right of establishment. This amounts to discrimination which prevents air transporters from other Member States which have not concluded such agreements from benefiting from the same treatment as the national airline in the European country concerned, although Community rules on the right of establishment ban such conduct.

1.3 Now drawing the conclusions from these judgements, the Commission has taken stock of the Community's external relations in matters of air transport and is presenting the broad lines and basic principles of the Community's external policy in this sphere. It considers that the Court's rulings also have immediate legal effects which the Union will need to take into account in the short term. Such is the case, firstly, with the provisions of each agreement which henceforth fall within the exclusive external competence of the Community. Secondly, the nationality clauses inserted in nearly all the above-mentioned agreements violate Community law since they constitute discrimination on grounds of nationality.

2. Gist of the proposal

Within their own areas of responsibility (area of responsibility particular to Member States; bilateral agreements contravene Community law and must be adjusted, given the absence of negotiations carried out at Community level), Member States may continue to conclude or amend agreements with third countries in accordance with Community law. Since one of the nubs of the problem concerns deciding who is responsible in any given area, the countries of the Union must cooperate closely with the Community institutions. The proposal in hand therefore lays down the arrangements and obligations with which Member States must comply when concluding agreements. Given that Member States have to take general Community interests into account, an efficient, transparent verification procedure must be established to this end. Each Member State has clear obligations to inform and update other Member States on the start-up and conclusion of negotiations on an agreement. Insofar as the airlines are involved in the negotiations, all Community airlines should be dealt with on an equal footing in order to avoid any discrimination and ensure that none of the countries involved receive preferential treatment. Generally speaking, there should be a ban on any rule which might create distortions in the EU's single market in air transport. Moreover, it is up to Member States to set up non-discriminatory, transparent procedures for distributing traffic rights between Community carriers.

³

Cases: C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 et C-476/98, Commission v. the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany.

3. Preliminary comment

3.1 Noting that the Council of Ministers reached a political agreement on this subject on 5 June, the EESC very much regrets the fact that such an agreement was adopted without waiting for the opinion of the EESC.

4. General comments

4.1 Following the above-mentioned Court of Justice judgement, the European air transport sector is in a precarious legal situation. Member States have concluded a considerable number of bilateral air agreements with third countries; some provisions of these contravene Community law. This said, the Commission has no mandate to carry out negotiations with third countries on matters falling within the competence of the Union and is consequently submitting a request to obtain one (see inter alia point 2).

4.2 It is becoming urgent for this matter of legal uncertainty to be settled quickly, due to the pressure being exerted by the air transport sector; it is vitally important for this sector to be able to rely on legally sound agreements, since traffic rights make up part of air transport companies' goodwill. The EESC therefore advocates prompt efforts to establish a clear legal framework for negotiating international air agreements. Such a framework must ensure that bilateral air agreements comply with Community law, while retaining the benefits (traffic rights) negotiated under these agreements.

4.3 Given the way that responsibilities have been distributed between the Member States and the Commission as regards negotiating international air agreements in the wake of the Court of Justice's judgments of 5 November 2002, it seems appropriate to set up a simple, clear, transparent and effective information procedure. A procedure of this type would mean that negotiations on aviation issues between the Member States or the Community and third countries could proceed in a coordinated fashion.

4.4 Under these conditions, it would seem wise to simplify as far as possible the administrative procedures by which Member States inform the Commission before entering into negotiations with third countries. Moreover, although it would appear desirable for the Commission to have the option of alerting a Member State if it seems that negotiations by that state are likely to jeopardize the Community's objectives, a procedure of this type should do no more than what is necessary for securing effective coordination between Member States and the Commission in negotiations carried out in their respective areas of responsibility.

5. Specific comments on the current proposal

Given that powers and responsibilities in the air transport sector are still shared, the EESC supports the principle underlying the Commission's initiative aimed at creating, by means of a

regulation, an effective mechanism for cooperation and consultation between Member States and the Community, so that problems and diverging approaches can be brought to light from the outset.

5.1 Article 1 (2)

Administrative procedures should be kept to a minimum (it seems somewhat excessive to require notification of all details of a new agreement, within the meaning of Article 1 (1), as early as one calendar month before contact is established with the third country concerned).

5.2 Article 4 (2)

The possibility given to the Commission to object to the conclusion of the agreement seems to go significantly beyond its legitimate prerogatives as regards information, notification and transparency. The EESC feels it is preferable to replace this with a provision whereby the Commission has the option of alerting a Member State if it appears that negotiations by that state are likely to jeopardise the Community's objectives.

Brussels, 16 June 2003.

The President
of the
European Economic and Social Committee

The Secretary-General
of the
European Economic and Social Committee

Roger Briesch

Patrick Venturini